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No. 82-54

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS McCABE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether any part of petitioner's commuting expense is deductible as a business expense under Section 162 of the Internal Revenue Code of 1954.

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OPINIONS BELOW

The opinion of the United States Tax Court is reported at 76 T.C. 876 (1981). The opinion of the court of appeals (Pet. App. 1-26) as amended (App., *infra*) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1982. The petition for a writ of certiorari was filed on July 9, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

§ 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or

incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagent under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, or property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, or possession which he represents in Congress shall be considered his home.

STATEMENT

Petitioner seeks review of the decision below holding that he is not entitled to deduct any part of his cost of driving to and from work under Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

In 1976 petitioner was a New York City police officer and resided in Suffern, New York, a suburb west of the Hudson River. The most direct route between petitioner's home and his duty station in Manhattan was through New Jersey. New York City Police Department regulations then in effect required that police officers be armed whenever they were in the city, unless otherwise directed (Pet. App. 3, 17 n.1). Carrying a firearm without a permit is generally prohibited in New Jersey (Pet. App. 44-46 n.1). Although

petitioner never applied for a New Jersey gun permit, the court of appeals apparently assumed that he would not have been granted a permit if he had applied (Pet. App. 17 n.2). Throughout 1976, petitioner used his automobile as his exclusive means of commuting to his duty station (Pet. App. 4). He traveled entirely by New York roads (Pet. App. 17-18 n.3). If petitioner had driven to work through New Jersey or taken public transportation through New Jersey, his commuting expenses would have been lower (Pet. App. 4-5, 17-18 n.3).

On his 1976 return, petitioner claimed a $2,950 deduction, representing the cost of driving to and from work, including tolls. The Commissioner of Internal Revenue disallowed the deduction (Pet. App. 5).

Petitioner sought review in the Tax Court, limiting his claim to the difference between his actual commuting expenses and the cost of public transportation through New Jersey. The Tax Court accepted petitioner's claim that he would have taken public transportation through New Jersey, if he had not been carrying his service revolver (Pet. App. 38-39). The Tax Court found, however, "that petitioner's additional commuting expenses were not directly connected with the pursuit of his employer's business, but were principally the result of his decision to reside in a comparatively remote suburb adjacent to New Jersey" (Pet. App. 39). Accordingly, the court held that petitioner's commuting expenses did not qualify as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code (Pet. App. 39-41).

The court of appeals concluded that the Tax Court's finding that petitioner's expenses were not "directly connected" with the pursuit of his business was not clearly erroneous (Pet. App. 12-15).[1] The court of appeals, therefore, affirmed the holding that no part of petitioner's commuting expenses was deductible as an ordinary and necessary business expense (*ibid.*). One judge dissented (Pet. App. 22-26).

ARGUMENT

The court of appeals correctly held that none of petitioner's commuting expenses was deductible under Section 162(a) of the Internal Revenue Code of 1954. The court's ruling is based on the Tax Court's finding that any incremental commuting costs incurred by petitioner were not directly connected with the pursuit of his business.

Section 162(a) allows a deduction for those expenses that are ordinary and necessary expenses incurred in carrying on any trade or business. Commuting expenses—those expenses incurred by a taxpayer in traveling between home and work—are not deductible under Section 162(a). They are "personal" nondeductible expenses under Section 262. Treasury Regulations on Income Tax (1954 Code), Sections 1.62-1(g), 1.162-2(e), 1.262-1(b)(5) (26 C.F.R.); see *Fausner* v. *Commissioner*, 413 U.S. 838, 839 (1973); *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). Although commuting expenses are not deductible, expenses incurred for transporting tools or similar work-related materials to

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[1]The paragraph at Pet. App. 13-14, beginning with the words "We turn now" and ending with the citation to *United States* v. *Florida*, 482 F. 2d 205 (5th Cir. 1973) has been deleted. App., *infra*. The second sentence of the paragraph at Pet. App. 14-15, which begins with the words "Since the Record" and ends with the words "Tax Court" has also been deleted. App., *infra*.

and from work may be deductible as ordinary and necessary business expenses. See Rev. Rul. 75-380, 1975-2 Cum. Bull. 59 (Pet. App. 63-65); *Fausner* v. *Commissioner*, *supra*, 413 U.S. at 839 (dictum).

Contrary to petitioner's view, this Court's holding in *Fausner* is not controlling here. In *Fausner* an airline pilot carried a 40-pound flight-kit bag (containing manuals, maps, and other work-related materials) and a 20-pound overnight bag to and from work in his automobile. *Fausner* v. *Commissioner*, 472 F. 2d 561, 562 (5th Cir.), aff'd, 413 U.S. 838 (1973). The pilot would have driven even if he had not needed to carry the two bags. 413 U.S. at 838. "[O]n the theory that his automobile expenses were incurred to transport his flight bag and overnight bag and thus constituted ordinary and necessary business expenses" (*ibid.*), the pilot attempted to deduct his commuting expenses. The Tax Court disallowed the deduction, and the court of appeals affirmed. 30 T.C.M. (CCH) 1187 (1971), aff'd, 472 F. 2d 561 (5th Cir. 1973). This Court affirmed on the ground that nondeductible "personal" expenses for commuting are not transformed into deductible business expenses by the "happenstance" that "the taxpayer must carry incidentals of his occupation with him" (413 U.S. at 839). The Court observed that if "[a]dditional expenses * * * for transporting job-required tools and materials to and from work" (*ibid.*) were incurred, some allocation of costs between nondeductible "personal" commuting expenses and deductible "business" expenses for transporting the equipment might be "feasible" (*ibid.*). On the facts before it, however, the Court concluded there was no basis for any such allocation.

Under Section 162(a), an expense is a deductible business expense only if there is a "direct connection" between the expenditure and the carrying on of the trade or business of either the taxpayer or his employer. See *Commissioner* v.

Flowers, 326 U.S. 465, 470 (1946); *Daly* v. *Commissioner*, 662 F. 2d 253, 255 (4th Cir. 1981) (en banc). Whether such a direct connection exists is a question of fact. *Commissioner* v. *Flowers, supra*, 326 U.S. at 470. Thus, even if a portion of a taxpayer's commuting expense might be attributable to something other than simply the need to get to and from work, the additional expenses are deductible only if there is also a direct connection between the incremental expenditures and the taxpayer's trade or business. *Fausner* suggests no modification of this principle.

The Tax Court found that petitioner's added commuting costs were not directly connected with his business, but were instead principally caused by the location of his home.[2] New York City's requirement that petitioner be armed when in the city and New Jersey's supposed prohibition of his travel there while armed, affected petitioner's commuting expenses only because of the location of his home. The fact that petitioner lived where he did and incurred added commuting costs in no way furthered police department business. Petitioner's commuting expenses obviously were the product of (1) the location of his home, (2) the New Jersey law, *and* (3) the requirement of his employer that petitioner be armed whenever he was in New York City. As the court of appeals held, however, the Tax Court's finding that petitioner's increased commuting expenses were insufficiently connected to the furtherance of his employer's business was not clearly erroneous (Pet. App. 12-14).[3] Petitioner asserts

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[2]Petitioner incorrectly states (Pet. 21) that the Tax Court found as a fact that he incurred added commuting costs solely as a result of his employer's requirement that he be armed within New York City.

[3]We also note that petitioner never applied for a New Jersey gun permit, and introduced no evidence to show that such an application would have been futile. See Pet. App. 24. Nor is it clear that petitioner needed a permit to carry his gun to work through New Jersey. See Pet. App. 44-46 n.1.

that considering the location of a taxpayer's home a cause of his added commuting expenses will always preclude a deduction for "additional expenses" of transporting tools or similar equipment, since such expenses can always be reduced by moving closer to one's place of employment. The facts of this case, however, are unusual. Typically, the need to carry bulky tools or equipment to work requires a taxpayer to incur added expenses, regardless of where he lives or how far he lives from his job.[4] On such facts a court could conclude that the additional expenses were "directly connected" with the pursuit of the taxpayer's business, and not "principally" the result of the location of his home. In this case, however, petitioner would not have incurred *any* added expenses of commuting were it not for the location of his home. On these facts the Tax Court properly found that petitioner's added commuting costs were not sufficiently connected with his job.[5]

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[4]The location of the taxpayer's home might affect the amount of the added expenses. But the additional costs for transporting tools would not be affected at all by the location of the taxpayer's home, if, for example, a taxpayer rents a trailer at a flat rate to carry his tools. See Rev. Rul. 75-380, 1975-2 Cum. Bull. 59, 60.

[5]The suggestion in *Fausner* that "additional expenses" (413 U.S. at 839) "incurred for transporting job-required tools and material to and from work" may support deduction of part of a taxpayer's "commuting expenses" may eventually require amplification. The Tax Court (Pet. App. 42-43) explicitly declined to consider the possible application of that suggestion in this case because petitioner had failed to show that any increased commuting expenses were directly connected to his trade or business. The court of appeals properly affirmed on that basis (Pet. App. 12-16). Thus, this is an inappropriate vehicle for any necessary amplification of *Fausner*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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